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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 MOHAMAD ALI SAID, an) Civil No. 12cv2437 GPC(RBB)
12 individual,)
13) ORDER GRANTING MOTION TO
14 Plaintiff,) COMPEL RULE 35 EXAMINATIONS
15) [ECF NO. 50]
16 v.)
17)
18 COUNTY OF SAN DIEGO; DEPUTY)
19 SHERIFF PATRICK LOPATOSKY;)
20 DEPUTY SHERIFF BRIAN BUTCHER;)
21 DEPUTY SHERIFF LEE SCOTT; DOES)
22 1-50, inclusive,)
23)
24 Defendants.)
25 _____)
26)
27)
28)

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20 On October 19, 2014, Defendants Patrick Lopatosky, Brian
21 Butcher, and the County of San Diego filed a "Motion to Compel Rule
22 35 Examinations [ECF No. 50]" (the "Motion to Compel"), along with
23 a Memorandum of Points and Authorities, a declaration of Stephanie
24 Karnavas, and several exhibits. No opposition was filed. The
25 Motion to Compel is suitable for resolution on the papers, so the
26 hearing set for November 17, 2014, at 10:00 a.m., is **VACATED**. See
27 S.D. Cal. Civ. R. 7.1(d)(1). For the reasons explained below, the
28 Motion to Compel is **GRANTED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Mohamad Ali Said filed, on October 9, 2012, a Complaint pursuant to 42 U.S.C. § 1983, alleging that he sustained injuries when he was unlawfully arrested by San Diego County Sheriff's deputies at his home on January 24, 2012. (Compl. 1, 3-4, ECF No. 1.) Additionally, Said raised several state law claims. (*Id.* at 1, 6-12.) A First Amended Complaint was filed on June 12, 2013, and a Second Amended Complaint was filed on November 19, 2013 [ECF Nos. 17, 23].

In the Second Amended Complaint, Plaintiff raises § 1983 claims against Deputies Patrick Lopatosky, Brian Butcher, and Scott Lee for unreasonable search and seizure, excessive force, false arrest, denial of medical attention, malicious prosecution, and violation of the Equal Protection Clause. (Second Am. Compl. 6, 8-10, ECF No. 23.)¹ Said alleges that the County of San Diego is liable for "Constitutional Violations via Unlawful Policies, Customs or Habits." (*Id.* at 7.) Plaintiff also raises state law claims for negligence, battery, false arrest, and violations of California Civil Code § 52.1. (*Id.* at 11-13.) As a result of Defendants' misconduct, Said states:

Plaintiff Mohamad Ali Said suffered severe injuries to his right elbow arm, head, back and neck, causing severe pain. He has been treating for a dislocated elbow and may require surgery in addition to therapy. He also suffered severe emotional distress as a result of the acts committed against him and as a result of being informed that his wife who is a represent [sic] a grave danger to his kids will be brought in to care for the two kids. Mohamad Ali Said also suffered severe fear, humiliation, damage to his reputation and emotional distress as a result of being arrested, taken to jail and being forced to endure the indignities of being booked,

¹ The Court will cite to all documents using the page numbers assigned by the electronic case filing system.

1 fingerprinted, photographed and searched at the county
2 jail despite the fact that he had done nothing unlawful.
3 Mohamad Ali Said had to pay bail to secure his release
4 from jail. He suffered further emotional distress as a
result of having to defend false criminal charges and he
has additional damages associated with having an arrest
record and having the criminal case filed against him.

5 (Id. at 5.)

6 Lopatosky, Butcher, Lee, and the County filed a Motion to
7 Dismiss Plaintiff's Second Amended Complaint on December 3, 2013
8 [ECF No. 24]. The motion to dismiss was granted in part and denied
9 in part by United States District Court Judge Gonzalo P. Curiel on
10 January 21, 2014 [ECF No. 31]. In his order, Judge Curiel
11 dismissed Lee as a Defendant (Order 14, ECF No. 31); the remaining
12 Defendants filed an Answer on February 4, 2014 [ECF No. 32]. An
13 early neutral evaluation conference and case management conference
14 were held on April 18, 2014 [ECF No. 37]. On October 19, 2014, the
15 Motion to Compel was filed [ECF No. 50].

16 II. LEGAL STANDARDS

17 Federal Rule of Civil Procedure 35(a) provides that a Court
18 may order a medical examination if a litigant's physical or mental
19 condition is "in controversy" and there is a showing of good cause.
20 "Rule 35 is to be 'construed liberally to allow the examination.'"
21 Sanders v. Holdings, No. 11cv1590 LAB (MDD), 2012 WL 2001967, at *2
22 (S.D. Cal. June 4, 2012) (citing Tan v. City and Cnty. of S.F., No.
23 C 08-01564 MEJ, 2009 WL 594238, at *2 (N.D. Cal. Mar. 4, 2009)).
24 When ordering an examination, the Court "must specify the time,
25 place, manner, conditions, and scope of the examination, as well as
26 the person or persons who will perform it." Fed. R. Civ. P.
27 35(a)(2)(B).
28

"A plaintiff's mental or physical condition is 'in controversy' when such condition is the subject of the litigation." Hernandez v. Simpson, No. ED CV 13-2296-CBM (SPx), 2014 WL 4090513, at *2 (C.D. Cal. Aug. 18, 2014) (citing Gavin v. Hilton Worldwide, Inc., 291 F.R.D. 161, 164 (N.D. Cal. 2013)). In determining whether a litigant's mental state is "in controversy," courts in this district apply the test outlined in Turner v. Imperial Stores, 161 F.R.D. 89, 95 (S.D. Cal. 1995). In Turner, the Court held that a mental examination may be ordered when one or more of the following circumstances are present:

1) a cause of action for intentional or negligent infliction of emotional distress; 2) an allegation of a specific mental or psychiatric injury or disorder; 3) a claim of unusually severe emotional distress; 4) plaintiff's offer of expert testimony to support a claim of emotional distress; and/or 5) plaintiff's concession that his or her mental condition is "in controversy" within the meaning of Rule 35(a).

Id. "In assessing whether 'good cause' exists, courts have considered 'the possibility of obtaining desired information by other means, whether plaintiff plans to prove her claim through testimony of expert witnesses, whether the desired materials are relevant, and whether plaintiff is claiming ongoing emotional distress.'" Conforto v. Mabus, No. 12cv1316-W (BLM), 2014 WL 3407053, at *3 (S.D. Cal. July 10, 2014) (quoting Juarez v. Autozone Stores, Inc., No. 08cv417-L (BLM), 2011 WL 1532070, *1 (S.D. Cal. Apr. 21, 2011)).

III. DISCUSSION

In the Motion to Compel, Defendants ask that the Court order Said to undergo a physical and a mental examination. (Mot. Compel Attach. #1 Mem. P. & A. 1, ECF No. 50.) They also request that the

1 Court address whether counsel or a third party may be present for
2 the examinations, as well as the extent to which the examiners may
3 inquire about how Plaintiff sustained his injuries. (Id. at 5.)
4 As noted, Said did not file an opposition to the Motion to Compel.
5 Although failure to oppose a motion may constitute consent to
6 granting it, the Court will consider the merits of Defendants'
7 motion. See S.D. Cal. Civ. R. 7.1(f)(3)(c).

8 **A. The Mental Examination**

9 **1. Whether Plaintiff's mental condition is "in controversy"**

10 Defendants argue that because Said alleges that he suffered
11 severe emotional distress as a result of the deputies' conduct, his
12 mental condition is in controversy. (Mot. Compel Attach. #1 Mem.
13 P. & A. 4, ECF No. 50.) According to Defendants, Plaintiff has
14 also claimed that he plans to offer expert testimony in support of
15 this claim. (Id.) Moreover, in Said's discovery responses he
16 stated that he continues to suffer from emotional distress. (Id.
17 at 2-3 (citing id. Attach. #2 Ex. 2, at 26-27).) For these
18 reasons, Defendants assert that Plaintiff should be ordered to
19 undergo a mental examination. (Id. at 4.)

20 As noted, to determine if Said's mental condition is in
21 controversy, the Court must evaluate the five Turner v. Imperial
22 Stores factors. Under the first factor, Said has not alleged a
23 cause of action for intentional or negligent infliction of
24 emotional distress. (See generally Second Am. Compl. 6-13, ECF No.
25 23.) Nor does he claim that he suffers from a specific psychiatric
26 condition or that his distress is "unusually" severe. See Turner,
27 161 F.R.D. at 95 (explaining second and third factors,
28 respectively). In light of the fact that Said did not file an

1 opposition to the Motion to Compel, it is unclear the extent to
 2 which Plaintiff admits that his mental condition is in controversy
 3 under the fifth Turner factor. (See Mot. Compel Attach. #2 Decl.
 4 Karnavas 2, ECF No. 50 ("Mr. Shashaty indicated that he had spoken
 5 with some other attorneys about the mental examination, and
 6 apparently based on those discussions, he believed a court order
 7 was required.")). But see S.D. Cal. Civ. R. 7.1(f)(3)(c) ("If an
 8 opposing party fails to file the papers in the manner required by
 9 Civil Local Rule 7.1.e.2, that failure may constitute a consent to
 10 the granting of a motion or other request for ruling by the
 11 court.").

12 Under the fourth Turner factor, the Court must take into
 13 account whether Plaintiff will offer expert testimony in support of
 14 his emotional distress claim. See Turner, 161 F.R.D. at 95.
 15 Plaintiff Said represents in his expert designations that he plans
 16 to call Dr. Ha Mistry, M.D., at trial, a "[p]sychiatrist with
 17 Knowledgeable [sic] about the injury and mental evaluation and
 18 treatment and also dispensing Medication for psychiatric condition
 19 treatment." (See Mot. Compel Attach. #2 Ex. 3, 34, ECF No. 50.)
 20 Given Plaintiff's stated intent to introduce expert testimony to
 21 support his emotional distress claim, Defendants have adequately
 22 established that Said's mental condition is "in controversy." See
 23 Turner, 161 F.R.D. at 95 (stating that mental examinations have
 24 been ordered when one or more of the factors were met).

25 **2. Whether Defendants have established good cause for the**
 26 **mental examination**

27 Defendants assert that they have also shown good cause for the
 28 Court to order a mental examination. (Mot. Compel Attach. #1 Mem.

1 P. & A. 5, ECF No. 50.) First, they maintain that they need the
2 examination to evaluate Plaintiff's condition and the extent to
3 which it is attributable to their conduct. (Id.) The requested
4 examination could yield evidence showing "possible pre-existing or
5 alternative causes to Plaintiff's injuries that could have a
6 mitigating effect on Plaintiff's claimed damages." (Id.)
7 Lopatosky, Butcher, and the County also insist that they have
8 established good cause in light of the fact that Said intends to
9 call an expert witness to prove his emotional distress. (Id.)
10 Finally, Defendants urge that the information sought is relevant to
11 Plaintiff's damages calculation. (Id.)

12 Said claims that he still suffers from emotional distress as a
13 result of Defendants' conduct. (See Mot. Compel Attach. #2 Ex. 2,
14 at 26-27, ECF No. 50.) Further, the information sought could be
15 relevant to evaluate the testimony of Dr. Mistry. Defendants have
16 established good cause for the mental examination. The Defendants'
17 Motion to Compel Plaintiff to undergo a mental examination is
18 **GRANTED.**

19 **B. The Physical Examination**

20 Defendants argue that Plaintiff does not dispute that a
21 physical examination is appropriate under these circumstances.
22 (Mot. Compel Attach. #1 Mem. P. & A. 3-4, ECF No. 50 (citing id.
23 Attach. #2 Decl. Karnavas at 2).) Said has alleged a permanent
24 injury to his elbow and intends to call multiple experts at trial
25 to testify about his injury. (Id. at 4.) Because Plaintiff's
26 counsel suggested conditions on the scope and structure of the
27 physical examination, they will be addressed below. (See id. at 3
28 (citing id. Attach. #2 Decl. Karnavas at 1-2).)

1 **C. Conditions and Scope of the Examinations**

2 According to Defendants, Plaintiff's counsel was willing to
3 agree to the proposed physical examination under the following
4 terms: "1) that the examination be audio recorded; 2) that the
5 examining physician be prohibited from asking Plaintiff questions
6 regarding the incident or how his alleged injury occurred; and 3)
7 that Plaintiff's counsel or some other third party be allowed to
8 attend the examination." (Id. at 5 (citing id. Attach. #3 Decl.
9 Karnavas at 2).) While Defendants do not object to the audio
10 recording of either examination, they contend that the remaining
11 conditions are "unnecessary and unreasonable." (Id. at 5-6 (citing
12 Nguyen v. Qualcomm Inc., Civil No. 09-1925-MMA (WVG), 2013 WL
13 3353840, at *8 (S.D. Cal. July 3, 2013)).) Defendants intend that
14 both examinations be "neutral and non-adversarial, and [they state
15 that] neither Plaintiff's counsel, nor any other third party,
16 should be allowed to attend the examinations." (Id. at 6.)

17 As noted, Said did not file a response to the Defendants'
18 Motion to Compel. Absent any opposition or explanation from Said,
19 the Court will not interfere with the medical examiners'
20 professional judgment or ability to conduct a comprehensive
21 evaluation. See Gavin, 291 F.R.D. at 166-67 ("The court expects
22 the examiner will act professionally and not subject [the
23 plaintiff] to unnecessary inquiries. It will not micromanage the
24 examination.") (citations omitted); see Romano v. II Morrow, Inc.,
25 173 F.R.D. 271, 273 (D. Or. 1997) ("To restrict a physician from
26 questioning a patient during a physical examination unduly
27 restricts the physician's ability to obtain the information
28 necessary to reach medical conclusions."). The examining doctors

1 may question Said to the extent necessary to properly evaluate his
2 physical and mental conditions. See Sanders, 2012 WL 2001967, at
3 *4 ("Dr. Kalish may ask and Plaintiff shall answer questions
4 regarding the events that are the subject of this action only to
5 the extent necessary for Dr. Kalish properly to evaluate
6 Plaintiff's mental condition."); Torres v. Kings Cnty., No. CV F 06
7 0102 OWW WMW, 2007 WL 1725481, at *2 (E.D. Cal. June 14, 2007)
8 ("The scope of the testing would be limited to the nature and
9 extent of any psychological injuries plaintiff is claiming as the
10 result of the incident that is the subject of this litigation.").

11 Said has failed to establish that counsel or another third
12 party should be allowed to attend either examination. "'Federal
13 courts have determined that third parties -- whether human or
14 electronic [] cannot sit in on physical and mental examinations
15 under FRCP 35 unless special circumstances require it.'" Conforto,
16 2014 WL 3407053, at *5 (quoting Nguyen, 2013 WL 3353840, at *9).
17 Plaintiff has not shown that any special circumstances exist
18 necessitating the presence of counsel or another third party. See
19 also Ashley v. City and Cnty. of S.F., No. CV-12-00045-JST (KAW),
20 2013 WL 2386655, at *3-4 (N.D. Cal. May 30, 2013) (denying request
21 for a third party to be present during examination, in part due to
22 concerns that third party could interfere with examination).

23 IV. CONCLUSION

24 For the reasons explained above, Defendants' Motion to Compel
25 [ECF No. 50] is **GRANTED**. Plaintiff is ordered to undergo both a
26 mental and physical examination. The Court finds that the
27 conditions proposed by Defendants are reasonable, and orders as
28 follows:

1 **A. Mental Examination**

2 The mental examination of Plaintiff will be conducted on
3 November 24, 2014, at 9:00 a.m., or on some other mutually
4 agreeable date and time at least one week prior to December 15,
5 2014. The examination will take place at the San Diego offices of
6 Mark Kalish, M.D., located at 3131 Camino del Rio North, Ste. 270
7 San Diego, CA 92108. The examination will not exceed six hours and
8 will consist of an interview of Said and standard psychological
9 testing which may include the following: MMPI-2, Millon Clinical
10 Multiaxial Inventory - III, Wahler Physical Symptoms Inventory
11 Test, Shipley Intellectual Assessment Test, The Measurement of
12 Depression Test of Zung's, Beck Depression Inventory Test, and Beck
13 Anxiety Inventory Test. Dr. Kalish may ask and Plaintiff shall
14 answer questions regarding the events that are the subject of this
15 action only to the extent necessary for Dr. Kalish properly to
16 evaluate Plaintiff's mental condition. The only people allowed to
17 be present at the examination are Plaintiff, Dr. Kalish, and any
18 other members of Dr. Kalish's staff who are needed to conduct the
19 examination. The examination may be recorded by audio recording
20 only at the option of either party.

21 **B. Physical Examination**

22 The physical examination of Said will be conducted on December
23 4, 2014, at 12:00 p.m., or on some other mutually agreeable date
24 and time at least one week prior to December 15, 2014. The
25 examination will take place at the San Diego offices of Richard
26 Greenfield, M.D., located at 3737 Moraga Avenue, Suite A106, San
27 Diego, CA 92117. The examination will not exceed three hours and
28 will consist of a patient interview and a full and complete

1 orthopedic examination of all areas that Plaintiff claims to have
2 injured in the incident alleged in the Second Amended Complaint,
3 including but not limited to his right elbow/arm. The examination
4 may include x-rays and magnetic resonance imaging to the extent Dr.
5 Greenfield determines such diagnostic tools are necessary to
6 conduct a complete examination. Dr. Greenfield may ask and
7 Plaintiff shall answer questions regarding the events that are the
8 subject of this action only to the extent necessary for Dr.
9 Greenfield properly to evaluate Plaintiff's physical condition.
10 The only people allowed to be present at the examination are Said,
11 Dr. Greenfield, and any other members of Dr. Greenfield's staff
12 needed to conduct the examination. The examination may be recorded
13 by audio recording only at the option of either party.

14 IT IS SO ORDERED.

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16 DATE: November 7, 2014



Ruben B. Brooks
United States Magistrate Judge

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18 cc:
19 Judge Curiel
20 All parties of record
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